Office-Supreme Court, U.S.
FILED
ALEXANDER L. STEVAS
CLERK

Nos. 84-805 and 84-801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,
Petitioner,

v.

THE CITY OF NEW YORK and STATE OF NEW YORK,
Respondents.

MIDLANTIC NATIONAL BANK,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE STATE OF WEST VIRGINIA AND FIFTEEN STATES AS *AMICI CURIAE*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13pp

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THE INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are the Attorneys General of the State of West Virginia and the states of Indiana, Texas, Oklahoma, Delaware, Pennsylvania, Connecticut, Tennessee, Ohio, New Mexico, North Carolina, Michigan, New Hampshire, Vermont, Kansas and Illinois, who file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States. In each of the *amici* states, the governors and the legislatures have developed or are developing comprehensive statutory and regulatory programs for assuring the public health, safety and welfare by protecting the environment.[1]

Crucial to such state programs are state statutes and city ordinances intended to impose liability for abatement and rehabilitation upon the polluter who violates these laws and thereby causes serious environmental harm. The United States Court of Appeals for the Third Circuit correctly recognized the importance of such laws and reversed the courts below it, remarking "[t]hat Congress did not intend to abrogate the enforcement of state police power regulations . . ." 739 F.2d 912, 918. When the bankruptcy courts allow abandonment and thereby relieve illegal operators such as Quanta, and their legal successors, the trustees in bankruptcy, of precisely such responsibility, the bankruptcy courts effectively nullify those state programs and jeopardize the public health and safety. The decision of the United States Court of Ap-

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[1] West Virginia's statutes are illustrative of the comprehensive program of environmental protection. Each statute is designed to address a particular area of concern. West Virginia Water Pollution Control Act, W. Va. Code § 20-5A-1 *et seq.*, 1981, 1984 Supp. (Water Pollution); West Virginia Air Pollution Control Act, W. Va. Code § 16-20-1 *et seq.*, 1985 (Air Pollution); West Virginia Hazardous Waste Management Act, as amended, W. Va. Code § 20-5E-1 *et seq.*, 1981, 1984 Supp. (Hazardous Waste); West Virginia Solid Waste Management Act, as amended, W. Va. Code § 20-5F-1 *et seq.*, 1981, 1984 Supp. (Solid Waste); West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code § 20-6-1 *et seq.*, 1981, 1984 Supp. (Surface Mining).

peals for the Third Circuit prohibiting such a result should be affirmed.

The common interest of the *amici* lies in the preservation of their ability to protect the citizenry through enforcement of state police power enactments. They also seek to vindicate the Congressional intent that the Bankruptcy Code honor, rather than undermine, the legitimate interest of the states in seeking the abatement of hazards and nuisances which threaten the public health, safety and welfare. *The amici* have a growing concern that lower federal courts are failing as federal courts of equity by allowing bankrupts to subvert these important state interests.

In recent years, Congress has increasingly recognized the importance of protecting the same interests served by the state environmental protection statutes.[2] The comprehensive regulatory scheme enacted by Congress is designed to protect against, *inter alia*, existing and past unlawful hazardous waste disposal activities and includes provisions for state enforcement of various federally imposed requirements. If the Third Circuit's decision is reversed, that scheme could be impaired severely. The *amici* also have an interest in protecting the effectiveness of the federal programs and the ability of the states to enforce the provisions of those laws.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit protected the public health and safety and vindicated Congressional policy under the Bankruptcy Code by refusing to allow the bankrupt Quanta Resources to abandon its responsibilities with respect to two dangerous hazardous waste disposal sites.

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[2] *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7401; the Federal Water Pollution Control Act, 33 U.S.C. § 1251; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901; the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201; the Comprehensive Environmental Response, Compensation and Liability Act (Superfund legislation), 42 U.S.C. § 9601.

Even assuming that Congress may have granted the federal bankruptcy courts a new statutory power to overrule the states' exercise of the police power reserved to them under the Tenth Amendment, to jeopardize the public health and safety, to ignore the intent of the Bankruptcy Code and to disregard the federal legislative scheme controlling and regulating hazardous waste, it is manifestly clear that the Constitution requires that such power must be exercised, if ever, in a manner consistent with the balancing of interests required of a federal court sitting in equity, rather than as a purely commercial tribunal whose sole interest lies in the vindication of creditors' rights. The United States Court of Appeals for the Third Circuit properly reversed such an untoward result and should be affirmed.

ARGUMENT

The United States Court of Appeals for the Third Circuit protected the public health and safety and vindicated Congressional policy under the Bankruptcy Code by refusing to allow the bankrupt Quanta Resources to abandon its responsibilities with respect to two dangerous hazardous waste disposal sites.

By interfering with the legitimate efforts of New York, New York City and New Jersey to contain and control severe environmental hazards by compelling the bankrupt to comply with state and local laws respecting environmental protection, the bankruptcy court imperiled the public health and safety in the vicinity of the two sites. The United States Court of Appeals for the Third Circuit correctly reversed the courts below, remarking: "[c]onsidered in the light of other provisions that both limit the supersession of state laws and specifically incorporate equitable principles into a bankruptcy court's jurisdiction, it is clear that Section 554 [of the Bankruptcy Code] does not of itself preempt state police power regulations." 739 F.2d 912, 918 (3rd Cir. 1984).

Despite state statutes and city ordinances clearly intended to impose liability for abatement and rehabilitation upon the polluter who violates these laws and thereby causes serious environmental harm, the bankruptcy court in fact relieved Quanta—just such an illegal operator—and its legal successor, the trustee in bankruptcy, of precisely such responsibility.

State regulatory agencies throughout the nation are faced every day with the urgent need to protect their citizens from both the immediate dangers posed by the illegal disposal of hazardous and industrial waste, as in the instant cases, and by violations of the other state statutes[3] designed to protect the public health, safety and welfare. Such statutes represent valid exercises of the police power, reserved to the states under the Tenth Amendment to the Constitution of the United States. Traditionally recognized by this Court as the least limitable of the reserved powers, *Queenside Hills Realty v. Saxl*, 328 U.S. 80 (1946), the police power broadly authorizes the various states to regulate in order to protect the health, safety and welfare of their citizens.

Legitimate state enforcement action pursuant to such statutes is thwarted when illegal activities are sanctioned by the federal bankruptcy courts. In the instant cases, the federal bankruptcy court refused to show constitutionally mandated deference toward the states in the exercise of the police power. The decision of the United States Court of Appeals for the Third Circuit correctly redressed this imbalance, by reversing the courts below and refusing to allow abandonments which result in violations of the state laws and city ordinances concerning the disposal of hazardous waste.

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[3] The briefs of New York, New York City and New Jersey are replete with reference to the various state and municipal requirements relating to police power enactments respecting environmental protection. *See* n.1, *supra*.

Quanta's trustee in bankruptcy is under an absolute and unconditional obligation to comply with the laws of New York, New York City and New Jersey, and to apply all necessary assets of the estate to the cleanup of the two environmental disasters which Quanta owned and in the creation of which Quanta aided. The Bankruptcy Code itself contemplates that state police power actions will not be subjected to interference by the federal bankruptcy courts, *see* 11 U.S.C. § 362 (b)(4); 28 U.S.C. § 1478(a).[4] The trustee must comply with validly enacted state police power statutes, 28 U.S.C. § 959 (b). As the United States Court of Appeals for the Third Circuit remarked: "[t]he question thus presents itself: did Congress intend that the trustee's abandonment power be unrestricted by public health and safety regulations? Our examination of the bankruptcy laws and the authorities interpreting these laws reveals no such congressional intent." 739 F.2d 912, 916.

Furthermore, the action of the bankruptcy court was at marked variance with clearly expressed congressional intent respecting environmental protection against the illegal disposal of hazardous waste, *see, e.g.*, 42 U.S.C. §§ 6901(b)(4) and 6901(b)(5). The United States Court of Appeals for the Third Circuit specifically recognized that state and local law implement the same intent: "[t]he primary purpose of the state and local laws regulating the disposal of hazardous wastes is obviously to protect the public from the toxic effect of dangerous substances by preventing their uncontrolled discharge into the environment." 739 F.2d 912, 915 (3rd Cir. 1984).

The action of the bankruptcy court frustrated the operation and administration of the federal laws concerning the protection of the public against the dangers posed

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[4] Section 1478 of Title 28 was modified by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353. However, the policy protecting states from removal remained the same.

by the illegal disposal of dangerous industrial waste. Given the bankruptcy court's failure to respect the reserved police power of New York and New Jersey, and given its obstruction of the operation and administration of the federal environmental law, the decisions of the Bankruptcy Court were properly reversed, and the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

The United States Court of Appeals for the Third Circuit correctly required the bankruptcy court to carry out its obligations as a federal court of equity by balancing the public health, safety and welfare against the financial interests of Quanta's creditors.

The bankruptcy court below also failed as a federal court of equity.[5] The United States Court of Appeals for the Third Circuit properly identified the bankruptcy court as just such a court, 739 F.2d 912, 917, and proceeded to present the balancing of equities which the bankruptcy court should have, but here failed, to do:

> In this case, the state and local regulations advance a very important policy: to protect the public health by regulating disposal of toxic wastes. *Abandonment by the trustee clearly contravened applicable law, and did so not merely technically, but with severely deleterious implications for the public safety. . .*
>
> To be weighed against this manifestly important public policy is the policy advanced by abandonment, to preserve as much of the estate as possible for distribution to creditors. This policy must be viewed in light of the indications of a concurrent federal legislative policy to limit intrusion into state police power regulations, including environmental protection laws. . .

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[5] *See Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952); *In re Lewis Jones, Inc.*, 1 Bkr. Ct. Dec. 277 (E.D. Pa. 1974), which were cited with approval by the United States Court of Appeals for the Third Circuit, 739 F.2d 912, 916-918 (1984).

> But the extent (unproven in these proceedings) of the expenditures necessary to dispose of the waste properly is not in itself sufficient to outweigh the public interest at stake here. . . The supremacy clause does not require the suspension of the operation of New York's hazardous waste disposal laws. 739 F.2d 921-922 (footnotes omitted) (emphasis supplied).

As a court of equity, the bankruptcy court below succeeded only in protecting the limited group of entities which financed the creation of the two illegal hazardous waste disposal sites. It provided no consideration or protection for the citizenry actually or potentially affected by the illegal hazardous waste, and it chose to impose indirectly the costs of cleanup upon the already strained fisc of New York, New York City and New Jersey.

Were the trustee compelled to address his responsibilities with respect to the Quanta sites, the various creditors who financed the creation of the Quanta disasters would have nothing legitimate to complain of. A prudent lender is on inquiry notice with respect to real estate security, and such a lender ought logically at least on occasion to police such collateral. Even assuming that the creditors were unaware of the illegal conduct on the part of their debtor, this Court has sustained actions by governmental agencies which worked far more onerous deprivations without finding a compensable taking. For example, in *Astol Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663 (1974), a yacht lessor's boat was seized and forfeited by the authorities of Puerto Rico pursuant to the arrest of a dealer in illegal drugs who was using the boat to transport drugs. Despite the yacht lessor's complete lack of knowledge of or connection with the criminal enterprise, this court held that no unconstitutional deprivation was worked by the forfeiture.

Finally, the bankruptcy court below proceeded as though totally unaware that the state statutes and ordi-

nances involved in the instant cases (as well as their equivalents in West Virginia and other states) were enacted to implement and complement federal legislative action under the Commerce Clause.[6] The constitutional scheme protecting both the police power of the states and the power of the federal government to regulate interstate commerce was severely disrupted when the bankruptcy court below allowed abandonment to proceed.

The United States Court of Appeals for the Third Circuit has set forth a lucid and sensible analysis for bankruptcy courts to apply when they consider abandonments which may involve violations of state and local laws respecting the disposal of hazardous waste. On the one hand, the court must consider ". . . a very important policy: to protect the public health by regulating disposal of toxic wastes." 739 F.2d 912, 921. On the other hand, the court must consider ". . . the policy advanced by abandonment, to preserve as much of the estate as possible for distribution to creditors." 739 F.2d 912, 921. Where the two policies conflict, the court must rule in favor of the public health, safety and welfare. As the United States Court of Appeals for the Third Circuit concluded: "[t]he Supremacy clause does not require the suspension of New York's hazardous waste disposal laws." 739 F.2d 912, 921. Its judgments should be confirmed.

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[6] *See, e.g.*, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* *See also*, Wein, *Environmental Regulation and the Bankruptcy Act*, 17 *Duq. L. Rev.* 133, 136 (1978-1979).

CONCLUSION

The United States Court of Appeals for the Third Circuit protected the public health and safety and vindicated Congressional policy under the Bankruptcy Code by refusing to allow the bankrupt Quanta Resources to abandon its responsibilities with respect to two dangerous hazardous waste disposal sites. The United States Court of Appeals for the Third Circuit correctly required the bankruptcy court to carry out its obligations as a federal court of equity by weighing the public health, safety and welfare against the financial interests of Quanta's creditors.

Accordingly, the judgments of United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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